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OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

DEPARTMENT OF
TELECOMMUNICATIONS & ENERGY

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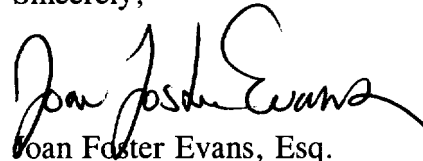
Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: Petition of Global NAPS, Inc. for Preemption of the Jurisdiction of the
Massachusetts Department of Telecommunications and Energy
CC Docket No. 99-354

Dear Secretary Salas:

Enclosed for filing please find one original and five (5) copies of the Commonwealth of Massachusetts' Department of Telecommunications and Energy's Opposition to the Application for Review of Global NAPs, Inc. in the above-referenced matter. Kindly file-stamp one copy and return it to me in the enclosed, self-addressed stamped envelope.

Sincerely,


Joan Foster Evans, Esq.

Enc.

cc: Mary Cottrell, DTE, Secretary
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Before the
FEDERAL COMMUNICATIONS COMMISSION

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In the Matter of)

Petition of Global NAPs, Inc. for Preemption of)
the Jurisdiction of the Massachusetts)
Department of Telecommunications and Energy)
Pursuant to Section 252(e)(5) of the)
Telecommunications Act of 1996.)

CC Docket No. 99-354

Opposition Of The
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Commonwealth of Massachusetts
Department of Telecommunications and Energy

James Connelly, Chairman
W. Robert Keating, Commissioner
Paul B. Vasington, Commissioner
Eugene J. Sullivan, Jr., Commissioner
Deirdre K. Manning, Commissioner

One South Station
Boston, Massachusetts 02110
(617) 305-3500

May 10, 2000

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Petition of Global NAPs, Inc. for Preemption of)
the Jurisdiction of the Massachusetts)
Department of Telecommunications and Energy)
Pursuant to Section 252(e)(5) of the)
Telecommunications Act of 1996.)

CC Docket No. 99-354

**Opposition Of The
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Pursuant to the Public Notice released April 10, 2000,¹ the Commonwealth of Massachusetts Department of Telecommunications and Energy ("Department") files this Opposition to the Application for Review of Global NAPs, Inc. ("GNAPs") for preemption of the Department's jurisdiction concerning GNAPs' dispute with New England Telephone and Telegraph Company d/b/a/ Bell Atlantic - Massachusetts ("Bell Atlantic"). For the reasons set forth below, the Department respectfully submits that the Federal Communications Commission ("Commission") should deny GNAPs' Application for Review.

In its Application for Review, GNAPs asks the Commission to review the Preemption Order² of the Common Carrier Bureau ("CCB") that denied its Petition for Preemption. GNAPs bases its request on three arguments: (1) the Preemption Order is in direct conflict with the plain language of Section 252(e)(5); (2) the Preemption Order conflicts with

¹ Pleading Cycle Established for Comments on Global NAPs, Inc. Application for Review of the Common Carrier Bureau's Memorandum Opinion and Order in CC Docket No. 99-354, DA 00-510 (rel. April 10, 2000).

² In the Matter of Global NAPs, Inc. Petition for Preemption of Jurisdiction of the Massachusetts Department of Telecommunications and Energy pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 99-354, Memorandum Opinion and Order (rel. March 7, 2000) ("Preemption Order").

Commission precedent; and (3) the Preemption Order exceeds the CCB's delegated authority and Section 252(e)(5) requires a Commission-level decision in 90 days.³ As the Department will demonstrate below, GNAPs fails to establish any of these grounds for review.

The Act⁴ allows the Commission to delegate any of its functions to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter.⁵ The Act also provides for Commission review of any such order, decision, report or action by way of an application for review.⁶

Commission rules specify the factors which warrant Commission review.⁷ The Commission will review an action taken pursuant to delegated authority when (i) the action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy; (ii) the action involves a question of law or policy which has not previously been resolved by the Commission; (iii) the action involves application of a precedent or policy which should be overturned or revised; (iv) an erroneous finding as to an important or material question of fact; or (v) prejudicial procedural error.⁸

GNAPs failed to establish any of the above grounds for review. The Preemption Order is in compliance with the Act and Commission precedent. In addition, the Preemption Order appropriately recognizes that the Department acted in fulfillment of its responsibilities under Sections 251 and 252. The Preemption Order is procedurally sound and based on Commission policy that should be upheld in this matter. For the foregoing reasons, the Commission should deny GNAPs' Application for Review.

1. The CCB Order is in compliance with Section 252(e)(5) of the Act.

Section 252(e)(5) directs the Commission to assume responsibility for any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under section 252. Section 252(e)(5) provides:

³ GNAPs Application for Review at 7, 14.

⁴ Telecommunications Act of 1996, Pub. L. No. 104-1-4, 110 Stat. 56 ("Act"), codified at 47 U.S.C. §§ 151 et seq. Hereinafter, all citations to the Act will be to the Act as it is codified in the United States Code. The Act amended the Communications Act of 1934.

⁵ 47 U.S.C. § 155(c)(1).

⁶ 47 U.S.C. § 155(c)(4).

⁷ 47 C.F.R. § 1.115(b).

⁸ 47 C.F.R. § 1.115(b)(2).

COMMISSION TO ACT IF STATE WILL NOT ACT.-- If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.⁹

In the Local Competition Order,¹⁰ the Commission adopted "interim procedures" to exercise preemption authority under section 252(e)(5) in order to "provide for an efficient and fair transition from state jurisdiction should [the Commission] have to assume the responsibility of the state commission. . . ." ¹¹ The Commission concluded that it would not take an "expansive view" of what constitutes a state commission's "failure to act" for purposes of section 252(e)(5). ¹² The Local Competition Order limited the instances in which Commission preemption under 252(e)(5) is appropriate to "when a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C)." ¹³ Under the Commission's rules, "[t]he party seeking preemption must prove that the state [commission] has failed to carry out its responsibilities under section 252 of the Act." ¹⁴ The Commission will preempt a state commission for failure to act only where the state commission "fails to respond, within a reasonable time, to a request for mediation, . . . or for a request for arbitration, . . . or fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act." ¹⁵

The Commission's rules and precedent on preemption under Section 252(e)(5) are consistent with the Act. The Act gives the authority to the states to conduct mediation and arbitrations of interconnection agreements. ¹⁶ It is therefore appropriate for the Commission to "decline to take an expansive view of what constitutes a state's "failure to act." ¹⁷ The Commission's rules and precedent support this view.

⁹ 47 U.S.C. § 252(e)(5).

¹⁰ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (rel. August 8, 1996) ("Local Competition Order").

¹¹ Local Competition Order, 11 FCC Rcd at 16127, ¶ 1283.

¹² Id. at 16128, ¶ 1285.

¹³ Id. at 16128, ¶ 1285; see also 47 C.F.R. § 51.801(b).

¹⁴ 47 C.F.R. § 51.803(b); see also Local Competition Order, 11 FCC Rcd at 16128, ¶ 1285.

¹⁵ 47 C.F.R. § 51.801.

¹⁶ 47 U.S.C. § 252.

¹⁷ Local Competition Order, 11 FCC Rcd at 16128, ¶ 1285.

Finally, GNAPs' assertion that the CCB's refusal to look behind the state commission claim to have mooted an interconnection dispute, "in direct conflict with the plain language of Section 252(e)(5)," is an impermissible collateral attack on valid agency regulations.¹⁸ The Commission has already interpreted the requirements of Section 252(e)(5), and has defined those circumstances where it will act upon a state commission failure to act.¹⁹ GNAPs may not, in its Application for Review, attack the validity of those regulations.²⁰

2. The CCB acted consistently with Commission precedent in dismissing GNAPs' Petition for Preemption.

The Commission's rules governing Section 252(e)(5) preemption specify that the Commission will preempt a state commission where that state commission fails to carry out its duties in a timely manner.²¹ The Commission's rules specify three circumstances where it will preempt a state commission under Rule 801.²² None of those circumstances are implicated here.

In its Preemption Order, the CCB denied GNAPs' Petition because the Department had taken final action addressing the interconnection dispute between GNAPs and Bell Atlantic, stating that Commission assumption of jurisdiction over the already-completed Massachusetts GNAPs/Bell Atlantic interconnection dispute was unwarranted.²³ In a recent case, the Commission found that "[p]rinciples of federal-state comity and efficiency lead us to question the merit of assuming jurisdiction over [a] completed state proceeding under the circumstances presented in this instance."²⁴ The CCB followed this reasoning in the Massachusetts Preemption Order. There is no basis for the Commission to abandon this approach.

Contrary to GNAPs' claims, the Commission's Rules do not require it to review a state claim that it has mooted a preemption petition. In the Preemption Order, the CCB declined to examine the underlying reasoning of the Department in determining that GNAPs' complaint is moot.²⁵ The Commission has stated previously that "[s]ection 51.801 of the Commission's

¹⁸ U.S. West Communications v. MFS Intelenet, Inc., 193 F.3d 1112 (9th Cir. 1999).

¹⁹ See 47 C.F.R. § 51.801.

²⁰ U.S. West Communications v. MFS Intelenet, Inc., 193 F.3d 1112 (9th Cir. 1999).

²¹ 47 C.F.R. § 51.801; Local Competition Order, 11 FCC Rcd at 16128, ¶ 1285.

²² 47 C.F.R. § 51.801(b).

²³ Preemption Order at ¶ 7-8.

²⁴ In the Matter of Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc., CC Docket No. 99-154, Memorandum Opinion and Order, ¶ 17 (rel. August 3, 1999) ("New Jersey Preemption Order").

²⁵ Preemption Order at ¶ 9.

rules does not focus on the validity of state commission decisions."²⁶ In a recent order, the Commission further explained its interpretation of "failure to act." The Commission stated that it had adopted a rule "that a state commission "fails to act" within the meaning of section 252(e)(5) only if it "fail[s] to complete its duties in a timely manner. Consequently, as long as a state commission completes its mediation or arbitration duties within the time permitted by federal law, our current rules prevent preemption pursuant to section 252(e)(5), even if the state commission "fails" to impose on incumbent LECs obligations required by federal law."²⁷ The CCB followed Commission precedent in making its determination in this matter.²⁸

GNAPs' reliance on Petition of MCI to bolster its claim that the CCB acted contrary to Commission precedent is misplaced.²⁹ There, the Commission decided that MCI's petition was not mooted by a Missouri Commission's Arbitration Order because that order did not address all outstanding issues between the parties. The reason for the Commission's decision was not, as GNAPs asserts, that the Commission "recognized that a state's claim to have mooted the underlying dispute in a preemption proceeding is, in essence, a claim that it has taken action to resolve the dispute."³⁰ Rather, the state commission order at issue only addressed pricing issues; however, there were outstanding non-price issues left unaddressed by the arbitration

²⁶ In the Matter of Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc., CC Docket No. 99-198, Memorandum Opinion and Order, ¶ 18 (rel. August 5, 1999) ("Virginia Preemption Order").

²⁷ In the Matter of American Communications services, Inc. and MCI Telecommunications Corp. Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended, CC Docket No. 97-100, Memorandum Opinion and Order, ¶ 32 (rel. December 23, 1999) ("Arkansas Preemption Order").

²⁸ In the Matter of Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission, CC Docket No. 97-163, In the Matter of Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with BellSouth Before the Georgia Public Service Commission, CC Docket No. 97-164, In the Matter of Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with GTE South Before the Public Service Commission of South Carolina, CC Docket No. 97-165, ¶ 26 (rel. October 8, 1997); New Jersey Preemption Order, ¶ 17; Virginia Preemption Order, ¶ 18; Arkansas Preemption Order ¶ 32.

²⁹ In the Matter of Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 97-166 (rel. September 26, 1997) ("Petition of MCI").

³⁰ GNAPs Application for Review at 9-10.

order.³¹ In contrast, the Department's decision addressed the question at the heart of GNAPs' complaint: whether Bell Atlantic was required to pay reciprocal compensation to GNAPs for termination of Internet Service Provider ("ISP")-bound calls. With this question answered in the negative, GNAPs' position in the underlying complaint could not prevail. Therefore, the Department appropriately dismissed the complaint.

GNAPs' argument that the CCB action was inconsistent with the Commission's Order declaring GNAPs' interstate ISP tariff to be unlawful is also incorrect.³² In the Tariff Order, the Commission based its decision in part on the fact that the question of whether GNAPs is due some form of intercarrier compensation for ISP-bound traffic under its interconnection agreement with Bell Atlantic is unresolved.³³ That question remains unresolved. What has been resolved is that under its interconnection agreement with Bell Atlantic, GNAPs has no right to reciprocal compensation for ISP traffic, which was the subject of its complaint with the Department. That issue has been resolved by the Department (see discussion of this point in section 3, below). The CCB action in the Preemption Order, declining to preempt the Department, is therefore consistent with the Tariff Order.

Because the CCB acted in accordance with Commission rules, and consistent with Commission precedent, the Commission should deny GNAPs' Application for Review.

3. Even if the CCB were required to assess the validity of the Department's decision, the decision of the Department is supported by the facts in this matter.

The Department acted in fulfillment of its responsibilities under Sections 251 and 252 of the Act. Specifically, the Department did in fact address GNAPs' complaint. In its Complaint filed April 16, 1999, GNAPs asked for "an adjudication of the rights of GNAPs to receive *reciprocal compensation payments* from [Bell Atlantic] for calls that [Bell Atlantic] end users make to Internet Service Providers ("ISPs") that receive their dial-in connections to the public switched network from GNAPs."³⁴ In D.T.E. 97-116-C and 97-116-D/99-39,³⁵ the Department directly addressed and resolved the question of whether Bell Atlantic was required

³¹ Petition of MCI at ¶ 32.

³² In the Matter of Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington D.C., Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Company, and New England Telephone and Telegraph Company v. Global NAPs, Inc., File No. E-99-22, Memorandum Opinion and Order (rel. December 2, 1999) ("Tariff Order").

³³ Tariff Order, ¶¶ 16, 21.

³⁴ GNAPs April 16, 1999 Complaint at 1 (emphasis added).

³⁵ MCI WorldCom v. Bell Atlantic, D.T.E. 97-116-C (1999); D.T.E. 97-116-D/99-39 (2000).

to make reciprocal compensation payments after the date of the Reciprocal Compensation Order³⁶ for handling CLECs' ISP-bound traffic.³⁷ The Department stated that "[r]eciprocal compensation need not be paid for terminating ISP-bound traffic (on the grounds that it is local traffic), beginning with (and including payments that were not disbursed as of) February 26, 1999."³⁸ The Department's D.T.E. 97-116-D/99-39 affirmed the results of the D.T.E. 97-116-C Order.³⁹

In its decision dismissing GNAPs' complaint, the Department explained the reasons for its action. "The operative provisions of GNAPs' agreement (i.e., the definition of local traffic and the payment of reciprocal compensation) are in all material respects the same as the provision[s] in the MCI WorldCom agreement, which were the subject of the dispute in [D.T.E. 97-116]."⁴⁰ The Department found that Bell Atlantic was not required to pay reciprocal compensation under the MCI WorldCom/Bell Atlantic interconnection agreement.⁴¹⁴² The Department's decision that GNAPs' complaint was moot in D.T.E.

³⁶ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68 (rel. February 26, 1999) ("Reciprocal Compensation Order").

³⁷ D.T.E. 97-116-C at 28.

³⁸ D.T.E. 97-116-C at 28.

³⁹ After the Department issued its D.T.E. 97-116-D/99-39 Order, the D.C. Circuit Court of Appeals vacated the Commission's Reciprocal Compensation Order. Bell Atlantic v. FCC, ___ F. 3d ___ (2000 WL 273383) (D.C. Circuit March 24, 2000). In response to this D.C. Circuit decision, GNAPs filed a Motion to Vacate the Department of Telecommunications and Energy's Orders Dated may 19, 1999 (D.T.E. 97-116-C), and February 25, 2000 (D.T.E. 97-116-D/99-39) and to Reinstate the Order dated October 21, 1998 (97-116). On April 14, 2000, the Department Hearing Officer in this matter reopened the docket in D.T.E. 97-116 to accept comments on GNAPs' Motion.

⁴⁰ D.T.E. 97-116-D/99-39 at 20-21.

⁴¹ D.T.E. 97-116-C at 28.

⁴² GNAPs' assertion that the Department improperly "refused to apply the analysis for interpreting interconnection agreements outlined in the Reciprocal Compensation Order" misses the mark. The Commission stated that, in the absence of a federal rule, state commissions were free to decide whether or not reciprocal compensation, or another form of intercarrier compensation, was due for termination of ISP traffic. Reciprocal Compensation Order at ¶ 26. The Department chose to address the applicability of reciprocal compensation in a proceeding of generalized applicability, of which GNAPs was a participant, instead of on a case-by-case basis. The Department found in that proceeding that reciprocal compensation was not due for ISP traffic. D.T.E. 97-116-C at 28. The Department's course of action was fully countenanced by

(continued...)

97-116-D/99-39 was based on the implicit finding that Bell Atlantic also was not obligated to pay reciprocal compensation under the GNAPs/Bell Atlantic interconnection agreement.

Because the Department ruled on the substance of GNAPs' complaint, the Department fulfilled its responsibility to act pursuant to Sections 251 and 252 of the Act. In its Preemption Order, the CCB correctly denied GNAPs' Petition for Preemption because the Department acted in fulfillment of its responsibilities. If GNAPs believes that the Department ruled incorrectly in D.T.E. 97-116-C and 97-116-D/99-39, its recourse is not before the Commission via a preemption petition under Section 252(e)(5), but to appeal the Department's decision in federal district court under Section 252(e)(6).

Moreover, GNAPs has an additional avenue available to it. With the formal resolution of the applicability of reciprocal compensation to ISP-bound traffic completed, the Department reiterated its offer, in its D.T.E. 97-116-D/ 99-39 Order, to assist parties, including GNAPs, to establish an appropriate inter-carrier compensation mechanism for ISP-bound traffic.⁴³ The Department based its offer on Section 252(a)(2), which provides that "[a]ny party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation." This section of the Act presupposes actual ongoing negotiations before a state commission will enter the discussions as a mediator. GNAPs admits that it asked for Department mediation immediately following the issuance of D.T.E. 97-116-C and prior to any actual negotiation.⁴⁴ Thus, GNAPs has an additional avenue with the Department for resolution of its dispute with Bell Atlantic by invoking the proffered mediation after it has engaged in good-faith negotiations with Bell Atlantic. GNAPs has not exercised this option.

4. The Commission should not permit GNAPs' attempted maneuvering around a valid state commission decision.

The Commission's rules and precedent in this area are sound, and should not be altered to accommodate GNAPs' desire to obtain a more favorable result. The Commission should prevent GNAPs from using its preemption rules to forum-shop to find a result to its liking. Nor should Section 252(e)(5) become an avenue for unhappy litigants to use the Commission to second-guess valid state determinations. Section 252(e)(5) should be invoked only when a state fails to grant to a carrier a forum to address its concerns. The Department has addressed GNAPs' complaint, reaching an appropriate and sound conclusion. If GNAPs is unhappy with the result, it may appeal that decision in federal district court to seek further remedy. Indeed,

⁴² (...continued)
the Reciprocal Compensation Order.

⁴³ D.T.E. 97-116-D/99-39, at 19.

⁴⁴ GNAPs Petition for Preemption at 4-5.

it has already pursued this route.⁴⁵ Clearly, Commission preemption is not the appropriate option for GNAPs, and this request should be denied.

5. The decision by the CCB is procedurally sound.

The CCB made a sound and correct determination in this matter. The Act gives the Commission the authority to delegate to the CCB.⁴⁶ Pursuant to Commission regulations, the CCB had adequate authority to make the determination it made in the Preemption Order.⁴⁷ As described above, the issues decided by the CCB were resolved under outstanding precedents and guidelines.⁴⁸ In addition, the CCB has decided other preemption petitions.⁴⁹ Therefore, the determination of the CCB is valid, and the Commission should decline to grant GNAPs' Application for Review.

⁴⁵ Global NAPs, Inc. v. New England Telephone and Telegraph Co., et al., C.A. No. 00-CV-10407-RCL (U.S.D.C. Dist. Mass.); Global NAPs, Inc. v. New England Telephone and Telegraph Co., et al., C.A. No. 00-CV-10502-RCL (U.S.D.C. Dist. Mass.).

⁴⁶ 47 U.S.C. § 155.

⁴⁷ See 47 C.F.R. § 0.291.

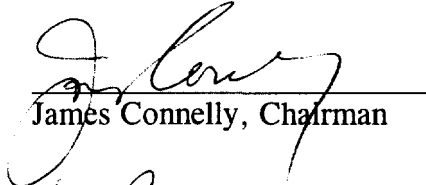
⁴⁸ 47 C.F.R. § 0.291(a)(2).

⁴⁹ See Virginia Preemption Order; In the Matter of Armstrong Communications, Inc. Petition for Relief Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CCB Pol. 97-6, Memorandum Opinion and Order (rel. January 22, 1998).

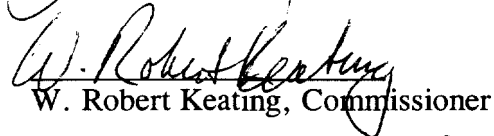
WHEREFORE, for the foregoing reasons, the Department respectfully requests that the Commission deny the Application for Review for Global NAPs, Inc.

Respectfully submitted,

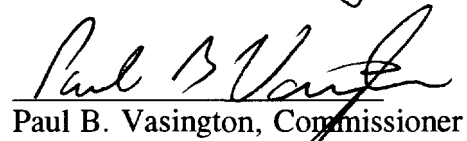
Commonwealth of Massachusetts
Department of Telecommunications and Energy



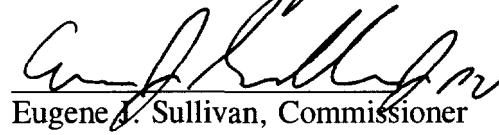
James Connelly, Chairman



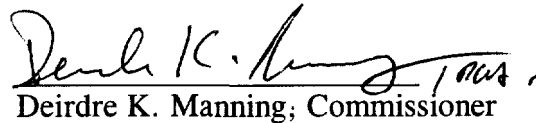
W. Robert Keating, Commissioner



Paul B. Vasington, Commissioner



Eugene J. Sullivan, Commissioner



Deirdre K. Manning, Commissioner

One South Station
Boston, Massachusetts 02110

May 10, 2000

CERTIFICATE OF SERVICE

I, Joan Foster Evans, hereby certify that on this 10th day of May, 2000, I caused a copy of the foregoing, attached document, submitted in Petition of Global NAPs, CC Docket No. 99-354, to be sent via overnight delivery, to the following:

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